IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 437

ARTHUR LEVINE, *Petitioner*

v.

EMILY KATHRYN LACY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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The Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of Appeals of Virginia entered on April 22, 1963, and denial of Petition for Rehearing entered on June 10, 1963.

OPINION BELOW

The Circuit Court of Loudoun County, Virginia, rendered no opinion. The opinion of the Supreme Court of Appeals of Virginia printed in Appendix A hereto, infra p. 1a, is reported at 204 Va. 297, 130 SE 2d 443.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on April 22, 1963 (rehearing denied on June 10, 1963). An order staying execution of the judgment until September 6, 1963, within which time the case must be docketed in the Supreme Court of the United States, was entered on June 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

This case involves suit for personal injuries arising out of an automobile accident in Virginia. Respondent (plaintiff below), a resident of Virginia, filed suit in the Virginia State Court and served petitioner (defendant below), a resident of Maryland, by serving the Commissioner of Motor Vehicles of Virginia, pursuant to Virginia Nonresident Motorist Act, Title 8, Section 67.1 of the Code of Virginia. Petitioner filed a Petition for Removal, Answer and Counterclaim in the United States District Court for the Eastern District of Virginia on the grounds of diversity of citizenship pursuant to U.S.C.A. 1446. Copies of these pleadings were filed in the State court pursuant to 28 U.S.C.A. 1446 (e). Thereafter respondent filed a reply to the Counterclaim and a Motion to Remand on the grounds that the Petition for Removal was filed more than 20 days after service upon the Commissioner of Motor Vehicles. The District Court granted the Motion for Remand [1] and the case was sent back to the State court.

[1] The District Court held that the 20 days in which to file Petition for Removal began to run on the date of service upon the Commissioner of Motor Vehicles, in Richmond, and not from the date the petitioner personally received the suit papers at his home in Maryland. No appeal lies from the District Court's order of remand, 28 U.S.C.A. 1447 (d).

The proceedings in the District Court consumed approximately seven months. Five days after receipt of the case from the District Court, the State court granted respondent a default judgment without notice to the petitioner.[2] The petitioner, upon learning of the default, promptly moved the State court to vacate. Although the Motion to Vacate was made prior to the Court's ex parte hearing on the proof on respondent's damages, the Court denied petitioner's Motion. The Supreme Court of Appeals of Virginia affirmed, holding that defendant was in default for failure to file an answer in the State court within 21 days, as required by its Rules, and this requirement was uneffected by the removal proceedings. On the foregoing facts the questions presented are:

1. Where defendant's (petitioner herein) answer and counterclaim and plaintiff's (respondent herein) reply thereto are filed in the District Court pursuant to the requirements of the Federal Removal Statute and Rule 81(c) F.R.C.P., may the State court, on remand, refuse to recognize said pleadings and enter a default against defendant, without notice?

2. Does due process require notice to the defendant before the entering of a default against him, where the trial judge, at the time of granting the default without notice, has before him in the Court file, a copy of defendant's answer and counterclaim substantially com-

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[2] The State Court's action in granting the default without notice apparently was based upon the defendant's failure to file an answer in the State Court within 21 days of service as required by its Rule 3:5 infra, p. 6. Having failed to file an answer within 21 days, the defendant was in default and not entitled to notice of any further proceedings in the case in accordance with its Rule 3:19 infra, pp. 8-9.

plying with the Court rules as to form and substance, filed 210 days earlier?

3. Has the defendant been denied equal protection of the laws where the plaintiff has waived the default, the defendant has substantially complied with the rules of procedure, and the trial judge has arbitrarily refused to vacate the default against him, entered without notice, where defendant moved to vacate within twenty-four hours of receipt of notice from a collateral source; before the taking of ex parte proof of plaintiff's damages and within nine days from the entry of default?

CONSTITUTIONAL PROVISIONS, STATUTES AND AND RULES INVOLVED

The United States Constitution, Amendment 14, Section 1, which provides:

> All persons born or naturalized in the United States, and subject to jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. 14, Sec. 1.

Title 28 U.S.C.A. 1446—Procedure for Removal provides:

The provisions are set forth in the Appendix B, infra, p. 8a.

Title 8, Section 67.3, Virginia Code, 1950, as Amended, which provides:

> The Court in which such action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend.

Federal Rules of Civil Procedure:

> REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal; whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. (Rule 81 (c)).

Rules of Supreme Court of Appeals of Virginia:

> A defendant may within 21 days after service on him of the notice of motion for judgment file

in the clerk's office his pleadings in response, and if he fails to file a pleading he is in default. Pleas of the general issue are abolished. If he files no other pleading than grounds of defense, he shall file his grounds of defense within said time. (Rule 3:5, Defendant's Response)

All steps and proceedings in the clerk's office touching the filing of pleadings and the noting of actions may be reviewed and corrected by the court. The time allowed for filing pleadings may be extended by the court in its discretion, and such extension may be granted though the time fixed has already expired; provided, however, that the time fixed by Rule 3:6 for filing pleas in abatement shall in no case be extended . . . (Rule 3:13, Discretion of Court)

All pleadings except the notice of motion for judgment shall be served on each counsel of record by delivering or mailing a copy to him on or before the day of filing.

At the foot of such pleadings shall be appended either acceptance of service or a certificate of counsel that copies were served as this Rule requires, showing the date of delivery or mailing. (Rule 3:15, Service of Copies of Pleadings Other Than Notice of Motion for Judgment)

Every draft of an order or judgment presented by counsel for entry shall either be endorsed by all counsel of record, or reasonable notice of the time and place of presenting it, together with a copy, shall be served by delivering or mailing to all counsel of record who have not endorsed it. Compliance with this Rule may be dispersed with

by the Court in its discretion. (Rule 3:16, Endorsement of Drafts)

(a) All bills of particulars and motions in writing are pleadings.

(b) A pleading that is sworn to is an affidavit for all purposes for which an affidavit is required or permitted.

(c) Counsel who files a pleading shall sign it and state his address.

(d) Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense. An allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence. On motion made promptly, a bill of particulars may be ordered to amplify any pleading that does not, in the opinion of the court, comply with this Rule. A bill of particulars that fails to inform the opposite party fairly of the true nature of the claim or defense may, on motion made promptly, be stricken and an amended bill of particulars ordered. If the amended bill of particulars fails to inform the opposite party fairly of the true nature of the claim or defense, the pleading not so amplified and the bills of particulars may be stricken.

Every order requiring a bill or amended bill of particulars shall fix the time within which it is to be filed.

(e) An allegation of fact in a pleading that is not denied by the adverse party's pleading, when

the adverse party is required by these Rules to file such pleading, is deemed to be admitted. An allegation in a pleading that the party does not know whether a fact exists shall be treated as a denial that the fact exists.

(f) Requirements of pleading applicable to instruments not under seal shall apply to instruments under seal.

(g) Requirements of pleading applicable to legal defenses shall apply to equitable defenses.

(h) Contributory negligence shall not constitute a defense unless pleaded or shown by the plaintiff's evidence.

(i) An allegation that an action is barred by the statute of limitations is sufficient without specifying the particular statute relied on.

(j) Grounds of defense, counterclaims, cross-claims, pleas, demurrers, affirmative defenses and motions may all be included in the same paper if they are separately identified.

(k) The clerk shall note and attest the filing date on every pleading. (Rule 3:18, General Provisions as to Pleadings)

A defendant who fails to plead to a notice of motion for judgment within the required time is in default. He is not entitled to notice, including the notice to take depositions, of any further proceedings in the case. He waives trial by jury, and all objections to the admissibility of evidence. The court shall, on motion of plaintiff, enter judgment for the amount appearing to the court to be due. If the relief demanded is unliquidated damages

the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event a jury shall be enpaneled to fix the amount of damages. (Rule 3:19, Judgment by Default).

STATEMENT OF THE CASE

On the 10th day of February 1961, respondent, Emily Kathryn Lacy, filed a Motion for Judgment against the petitioner, Arthur Levine, who resides in Rockville, Maryland, in the Circuit Court of Loudoun County, Virginia At Law No. 2199. Process was issued by the Clerk of the Circuit Court of Loudoun County, Virginia, and forwarded together with a copy of the Motion for Judgment to the Virginia Commissioner of the Division of Motor Vehicles, in Richmond. The Commissioner received the Notice and Motion for Judgment on the 13th day of February, 1961, and sent them by registered mail on the same day to the petitioner in Rockville, Maryland. The exact date that the petitioner personally received the Notice and Motion for Judgment is not clear but said documents were received on his behalf within a day or two after February 13, 1961.

On March 9, 1961, the petitioner filed a Petition for Removal, based upon diversity of citizenship pursuant to 28 USC 1446 (b), a Notice of Removal, Removal Bond and Answer and Counterclaim in the United States District Court for the Eastern District of Virginia, at Alexandria, Civil Action No. 2339. On March 9, 1961, counsel for petitioner mailed to counsel for respondent and to the Clerk of the Circuit Court of Loudoun County, Virginia, a copy of said Petition for Removal, Notice of Filing of Petition and Bond for

Removal and Defendant's Answer and Counterclaim for filing in Law No. 2199, pursuant with the requirements of 28 USC 1446 (e). Because of an ensuing weekend the foregoing pleadings were not received and filed by the Clerk of the Circuit Court of Loudoun County, Virginia, until March 13, 1961.

On the 14th day of March, 1961, counsel for the petitioner served upon counsel for the respondent a notice scheduling the deposition of the respondent on March 28, 1961. At the request of counsel for respondent, the aforesaid deposition was continued from March 28, 1961. On the 23rd day of March, 1961, respondent replied to petitioner's Counterclaim. On the 23rd day of March, 1961, respondent filed a Motion to Remand the case from the Federal court to the State court with attached Notice of Motion and Memorandum of Points and Authorities. On the 24th day of March, 1961, respondent filed an Amended Motion to Remand the case from the Federal to the State court with attached Memorandum of Points and Authorities. On the 11th day of April, 1961, the Honorable Albert V. Bryan, Judge for the U. S. District Court for the Eastern District of Virginia, at Alexandria, wrote to counsel for respondent with copies to all other counsel, advising that the case would be scheduled for pretrial on May 5, 1961. On May 5, 1961, the attorneys for the respondent and the petitioner personally appeared before the U. S. District Court for the Eastern District of Virginia at which time respondent's Motion to Remand was scheduled for a hearing on June 9, 1961. On the 9th day of June, 1961, counsel for respondent and petitioner appeared before Judge Albert V. Bryan of the U. S. District Court and argued respondent's Motion to Remand. Judge Bryan took the aforesaid

Motion under advisement and on the 26th day of September, 1961, issued a Memorandum Opinion, mailed to all counsel, remanding the case to the Circuit Court of Loudoun County, Virginia. A certified copy of said Order of Remand was filed in the Circuit Court of Loudoun County on October 4, 1961.

Each of the aforesaid pleadings and correspondence contained mailing certificates or notations evidencing copies sent to counsel of record for the petitioner. During the foregoing period of time counsel for respondent took no action in the Circuit Court of Loudoun County nor evidenced any dissatisfaction with the status of the pleadings in that Court. He neither intimated that the petitioner was in default nor that he intended to pursue any technical failure to comply with the rules of procedure of that court. On October 6, 1961, counsel for petitioner wrote to counsel for respondent requesting copies of respondent's medical reports and an itemization of special damages in order to explore possibilities of settlement and to determine whether respondent should be examined by physician of the petitioner's choice. Counsel for respondent did not reply to this letter.

On the 9th day of October, 1961, without notice, counsel for respondent obtained the entry of a default against the petitioner in the Circuit Court of Loudoun County and had the case set down for an ex parte hearing on proof of damages, without a jury, on October 25, 1961. This hearing was subsequently moved up to October 18, 1961. On October 17, 1961, the petitioner learned of the default from another source. Counsel for petitioner appeared before the Trial Court on the morning of October 18, 1961, advised the Court of its lack of notice and filed a motion to set aside the entry

of default or to continue the ex parte hearing pending formal consideration of the motion to set aside the default. The State court refused to consider counsel's motions and objections and proceeded with the taking of ex parte proof. At the end of this hearing the State court awarded the respondent judgment in the sum of Nine Thousand Dollars ($9,000.00).

Thereafter on the 27th day of October, 1961, the Trial Court heard arguments of petitioner's Motion and Amended Motion to Set Aside the Entry of Default. These Motions were taken under advisement by the State court.

On the 16th day of November, 1916, the State court entered an Order dismissing petitioner's Counterclaim on the representation of all counsel that the Counterclaim had been compromised, agreed and settled.

On the 26th day of February, 1962, the State court entered an Order denying petitioner's Motion to Set Aside the Default Judgment dated October 9, 1961, and the award entered on October 18, 1961, was rendered final. This default judgment was affirmed by the Supreme Court of Appeals of Virginia.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS UNDER THE FEDERAL REMOVAL STATUTE

The petitioner was not in default because the State court should have recognized the pleadings and proceedings in the District Court.

Upon the filing of the petition for removal in the District Court, the removal was effected and the State court was divested of jurisdiction. The State court could proceed no further unless and until the case was remanded. 28 U.S.C.A. 1446 (e).

Petitioner filed his petition for removal in the District Court 24 days after service on the Commissioner of Motor Vehicles, in Richmond. This was 3 days beyond the time for filing a responsive pleading in the State court, as provided by its Rule 3:5, *supra*. The petitioner, however, did file an answer simultaneously with the petition for removal and filed copies in the State court. 28 U.S.C.A. 1446 (e). Rule 81 (c), F.R.C.P.

It was not necessary for respondent to file new pleadings in the District Court. *Talley* v. *American Bakeries Co.* (D.C. Tenn. 1954), 15 FRD(1) 391; *Gillum* v. *Skelly Oil Co.*, (D.C. Md. 1957), 149 Fed. Supp. 588. The complaint (Motion for Judgment) was recognized by the District Court and its sufficiency could have been attacked and in fact its allegations were denied by petitioner in that Court. Likewise, the default of the petitioner in the State court could have been pursued by the respondent in the District Court. Instead the respondent replied to petitioner's counterclaim and moved to remand. Upon remand the State court refused to give any consideration to the pleadings or the proceedings in the District Court.

The Supreme Court of Appeals of Virginia in affirming the lower State court, relied upon *McCanna* v. *Mutual Investment & Agency Co.*, 37 N.M. 597, 26 P. 2d 231, a case decided in 1932. In that case the plaintiff filed her complaint on July 2, 1930. On August 23, 1930, defendant filed in the State court a notice, petition and bond for removal to the Federal court. On January 12, 1932, the case was remanded to the State court. *No other pleadings were filed.* On the day of remand the plaintiff was granted a default judgment against the defendant by the State court. The Su-

preme Court of New Mexico, affirmed, holding that defendant should have filed an answer at the time of filing the petition for removal, as required by the removal procedure at that time.

The *McCanna* case was decided under the removal procedure prior to the 1949 amendments thereto. 28 U.S.C. 72 et seq., 1940 ed. Under the earlier statute the petition for removal was filed in the State court and the State court was not divested of jurisdiction pending a determination of the removability of the case and an order of remand. Obviously the number of days in which defendant was in default for failure to answer would continue to accumulate during the proceedings for remand in District Court.

The present removal procedure, outlined in 28 U.S.C.A. 1446, was enacted in 1949. It provides a uniform time in which to file a petition for removal, directs the petition to be filed in the District Court with a copy also to be filed in the State court, and divests the State court of jurisdiction pending a remand by the District Court. In addition Rule 81 (c) F.R.C.P. was amended to provide that the defendant shall file his answer or other responsive pleading in the District Court within 5 days after the filing of the petition for removal. These changes were designed to give uniformity to the removal proceedings and to bring some order out of the chaos existing among the several states. The differences between the old and new removal proceedings are discussed in *Allen* v. *Hatchett*, 91 Ga. App. 571, 86 S.E. 2d 662. In that case the petition for removal was filed approximately 23 days after service of process upon the defendant. Upon remand to the State court, the State court held that the defendant was not in default for failure to file an answer therein within the

prescribed period and permitted the filing of defensive pleadings. The Court of Appeals of Georgia in affirming, held that whereas the State court jurisdiction did not abate under the earlier version of the removal statute, the present law required all proceedings in the Federal court after a petition for removal is filed therein.

It is submitted that the *McCanna* case no longer represents authority for the State court's refusal, upon remand, to recognize any pleading or proceedings filed in the District Court during the removal proceedings. There is nothing in the present removal statute which requires the filing of an answer of responsive pleading in the State court after filing a petition for removal in the District Court. Rule 81 (c) F.R.C.P., amended to be read in conjunction with the present removal statute, clearly outlines the time and place of filing defendant's answer. It is to be noted, however, that in the instant case petitioner also filed a copy of his answer in the State court along with a copy of the petition for removal.

Although the State court did not recognize defendant's answer, it did recognize the counterclaim contained in the same pleading. On November 16, 1961, over one month after entering the default for failure to answer, the judge entered an order dismissing the counterclaim as settled. The logic behind the refusal to recognize the existence of one part of a pleading and ignoring the other is not apparent.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS UNDER THE DUE PROCESS OF LAW PROVISIONS

The State court's granting of a default judgment, without notice, offends the requirements of due process.

The fundamental requirement of "due process of law" is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is invoked. Engrained in our concept of due process is the requirement of notice. In determining whether such rights have been denied, the courts are governed by the substance of things and not by mere form. This court has many times defined and outlined the requirement of notice as an essential element of due process and it should be unnecessary to repeat it here. *Lambert* v. *People of State of Cal.*, Cal. 1957, 78 S. Ct. 240, 355 U.S. 225, 2 L.Ed. 228, rehearing denied 78 S. Ct. 410, 355 U.S. 937, 2 L.Ed. 2d 419; *Shelley* v. *Kraemer*, Mich. & No. 1948, 68 S.Ct. 836, 334 U.S. 1, 92 L.Ed. 1161, 3 A.L.R. 2d 441; *State* v. *Standard Oil Co.*, N.J. 1950, 74 A.2d 565; and *Simon* v. *Craft*, Ala. 1901, 21 S.Ct. 836, 182 U.S. 436, 45 L.Ed. 1165.

Although the Constitution does not prevent the states from determining, on due notice and opportunity to be heard, by what process legal rights may be asserted or legal obligations enforced, it is essential that the elements of full notice and an opportunity to defend be observed. *Gelfert* v. *National City Bank of New York*, N.Y. 1941, 61 S.Ct. 898, 313 U.S. 221, 85 L.Ed. 1299, 133 A.L.R. 1467; and *Simon* v. *Craft*, *supra*. Moreover, due process requires that every person shall have the protection of his day in court and as a part of the judicial process the right to be heard in the court of last resort on the constitutional question. *Aero Design & Engineering Co.* v. *Oklahoma Employment Sec.*

Commission, D.C. Okla. 1956, 151 F.Supp. 844, affirmed 77 S.Ct. 824, 353 U.S. 943, 1 L.Ed.2d 855.

In the instant case, the petitioner received notice of the suit against him by service of process upon the Commissioner of Motor Vehicles of Virginia. Ordinarily, this notice would be sufficient for the State court to proceed in the action if he did not respond in a manner prescribed by its rules. However, in the posture of the case at the time of the entry of default, the State court's action in granting respondent a default judgment, without notice, makes a mockery of the requirements of due process of law. At the time the State court entered the default, the judge had before him in the court file a copy of the respondent's answer and counterclaim filed therein some 210 days earlier. This answer denied liability for the respondent's injuries and set forth the affirmative defense of respondent's contributory negligence. Although the caption of the answer showed that the original was filed in the United States District Court for the Eastern District of Virginia, it otherwise complied with the State court's rules as a sufficient answer to place the case at issue.

At the time of granting the default the State court judge was well aware of the earlier removal proceedings. It was clearly apparent to both the State court judge and the respondent that the petitioner fully intended to controvert and defend against respondent's claims. In addition, it was obvious that the petitioner intended to pursue his claim for injuries and damages outlined in the counterclaim which had been replied to by the respondent. Although the answer was filed a few days after the time requirements of the rules of the state court, it was filed many months before the

entry of the default and surely constituted substantial compliance with those rules.

In *Griffin* v. *Griffin*, 327 U.S. 22, 66 S.Ct. 556, the Supreme Court of the United States stated, at page 562:

> "Due process forbids any exercise of judicial power which, but for the constitutional infirmity would substantially affect a defendant's right."

In that case the defendant had actual notice and participated in an earlier divorce proceeding wherein alimony was awarded. Although the State law permitted the entry of additional orders for accrued alimony, the Court held that a subsequent judgment in the same proceedings for accrued alimony, entered without notice to the defendant, would not comply with the requirements of due process of law. This case clearly demonstrates that due process of law will require additional notice to the defendant, under certain circumstances where the Court's proposed action substantially affects his rights. The instant case is a classic illustration of the circumstances under which additional notice should be required before the action herein complained of. The petitioner's answer, substantially complying with the rules, had been in the file for six months. He obviously was relying on it to place his case at issue. In this posture, the Trial Judge's action in entering a default, without notice and an opportunity to be heard, clearly violates the fundamental requirements of fairness and notice that is engrained in our concept of due process. *Lambert* v. *People of State of California*, 355 U.S. 255, 78 S.Ct. 240; *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836.

In *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841, the Court stated that:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

In *Wetmore* v. *Karrick*, 205 U.S. 141, 27 S.Ct. 434, 51 L.Ed. 745, the Court held a default judgment, entered without notice to the defendant, as void for want of due process. Also see *Bass* v. *Hoagland* (CCA 5), 172 F.2d 205.

The requirements of notice before entry of a default has generally held to be necessary in order to meet the requirements of due process of law. 30A Am. Jur. 286, Judgments Section 207.

This case becomes of particular importance considering that it involves the rights of a nonresident who is brought before the State court pursuant to the implied appointment of a statutory agent for service. Today nearly every jurisdiction has a statutory means of service of process upon nonresidents involved in automobile accidents. Motorists who are required to appear and defend in actions arising out of accidents occurring in another state should be assured of the essential elements of a fair and impartial consideration and disposition of their case.[3]

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[3] The Virginia Legislature provided for the granting of additional time to the defendant to afford him an opportunity to defend, by enacting Title 8, Section 67.3, Virginia Code, 1950, as amended, *supra*, p. 5. The State court, however, gave no consideration to the reasons behind this section of the Code.

III. THIS CASE PRESENTS IMPORTANT QUESTIONS UNDER THE EQUAL PROTECTION OF THE LAWS PROVISIONS

A. The State court Should Have Vacated the Default Judgment Because Respondent Had Waived Her Right to a Default.

A default judgment is a privilege which may be waived by the actions of the parties. 124 A.L.R. 155, and cases cited thereunder. 30A Am Jur. 283, Judgments, Section 203. The plaintiff is considered to have waived defendant's default when he accepts a pleading filed out of time or files a replication. 49 C.J.S. 361, Judgments, Section 199, 203. Also see *Pollard & Haw* v. *American Stone Co.*, 111 Va. 147, 68 S.E. 266; *Gehl* v. *Baker*, 92 S.E. 852, 121 Va. 23; *L. E. Mumford Banking Co.* v. *Farmer's & Merchants Bank of Kilmarnock, Inc.*, 116 Va. 449, 82 S.E. 112; *Salzar, et al.* v. *Schwartz*, 107 S.E. 298 (West Virginia); *Covington Virginian* v. *Woods*, 182 Va. 538, 29 S.E. 2d 406.

In considering whether respondent, by conduct of counsel, waived her right to a default judgment or was estopped by her actions to claim a default, the following activity and conduct of counsel should be considered:

1. Counsel for respondent received and accepted copies of petitioner's Petition for Removal, Notice of Removal and Answer and Counterclaim filed in both Federal and State Court, on March 9, 1961, and March 13, 1961, respectively.
2. Respondent's counsel received and accepted a copy of petitioner's Notice scheduling respondent's deposition at the office of petitioner's counsel on March 28, 1961.
3. Respondent's counsel requested and received from petitioner's counsel a continuance of the taking of the respondent's deposition.

4. Respondent or respondent's counsel forwarded a copy of the Answer and Counterclaim to counsel for respondent's insurance carrier for answer thereto.

5. Respondent permitted counsel for her insurance carrier to file a reply to petitioner's Counterclaim without objection.

6. Respondent's counsel filed a Motion to Remand the case to the State court, serving copies upon counsel for petitioner.

7. Respondent's counsel filed an Amended Motion to Remand to the State court and served copies upon counsel for petitioner.

8. Respondent's counsel attended a pretrial hearing in the Federal court in which counsel for petitioner participated.

9. Respondent's counsel filed a rather lengthy Memorandum of Points and Authorities in support of his Motion to Remand and served copies upon counsel for petitioner.

10. Counsel for respondent received and accepted copies of petitioner's Opposition to the Motion to Remand and Memorandum of Points and Authorities in support thereof.

11. Respondent's counsel participated with counsel for petitioner in the argument before the Federal court on the Motion to Remand.

12. At no time did respondent or her counsel ever imply that he was dissatisfied with the date of the pleadings or that petitioner was in default.

The respondent could have pursued her claim for default in the Federal court but obviously chose not to in the belief that the State court would be a more sympathetic forum. Rule 81(c), F.R.C.P. This con-

stitutes conduct sufficient to waive any default by the petitioner in failure to strictly comply with the time limitation in which to file an answer in the State court. It cannot seriously be contended that the State court and the respondent were unaware of the presence of the petitioner in this proceeding and of his intention to controvert the claims. But in addition respondent should be estopped from opposing the vacation of the default by her ratification of the filing of the reply to petitioner's counterclaim, by settling the counterclaim and presenting an order to the State court for the dismissal thereof on November 16, 1961, several weeks after the entry of the default and the filing of petitioner's motions to set aside the default.

Imposing substantial liability and penalties upon the party for technically failing to comply with rules of procedure may be justified where that party has taken no steps to defend against the claims. In the instant case, the facts clearly do not warrant such severe penalties. Nothing in petitioner's actions prejudiced the claims of the respondent.* Justice requires that respondent's claim be decided on its merits after a full trial. To permit her to recover by means of penalty imposed upon the petitioner for some technical violation of the rules of procedure would result in a grave injustice.*

* Although it does not appear in this record, it was pointed out to the Supreme Court of Appeals of Virginia that the liability between the parties for this accident has been litigated in the Circuit Court of Prince William County, Va., in Law No. 2190. The jury found the accident to have been the result of respondent's gross negligence. The petitioner was exonerated of ordinary negligence. Petitioner offered to make the record of this case a part of the record on appeal.

B. Respondent Was Not Entitled To a Default Judgment Because of Petitioner's Substantial Compliance With the Rules of Procedure.

Petitioner's filing of a copy of his petition for removal, answer and counterclaim in the State court pursuant to 28 USCA 1446(e), substantially complied with the procedural requirements of the State court. Although filed a few days after the 21 days provided by Rule 3:5 of the state court rules, such filing was over 200 days before the entry of the default. The answer denied the allegations of defendant's liability and set up the affirmative defense of contributory negligence. In all respects, the answer fulfilled the requirements as provided in Rule 3:15 of the State court rules. *Supra*, p. 6. The rules of procedure should be construed so as to do substantial justice and the law prefers to dispose of litigation on its merits. *Hormel* v. *Helvering*, 312 U.S. 557, 61 S. Ct. 719; *U. S.* v. *The Ohio Power Company*, 353 U.S. 100, 77 S. Ct. 652; *Savage* v. *Nute*, 180 Va. 394, 23 SE 2d 133. These principles were clearly violated by the State court in ignoring the presence of defendant's answer and entering a default judgment.

C. The State court Judge's Refusal to Vacate the Default Was Arbitrary and an Abuse of Discretion

Petitioner moved to vacate the default against him within twenty-four hours of notice of its entry. His motion was filed and he appeared before the Court prior to the ex parte hearing on respondent's damages.[5] The judge's refusal to grant the motion was arbitrary and constituted an abuse of discretion. No opinion was

[5] The order entering the default scheduled the ex parte hearing for October 25, 1961. How and why this hearing was rescheduled for October 18, 1961, remains a mystery. Fortunately, petitioner learned of the default on October 17, 1961.

written nor reasons expressed for overruling the motion.

It is common practice in Virginia as in nearly all jurisdictions to grant continuances, leave to amend pleadings and relief from judgments where to refuse would result in a substantial injustice. *Jacobson* v. *Southern Biscuit Company*, 97 S.E. 2d 1, 198 Va. 813, *Turner* v. *Burford Buick Corporation*, 112 S.E. 2d 911, 201 Va. 693, *Letcher W. Goode* v. *Courtney*, 108 S.E. 2d 396, 200 Va. 804. In the instant case the injustice resulting from a denial was manifest. No prejudice to respondent by vacating the default was apparent.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Unless the Virginia judgment is reversed, it will substantially limit the rights of nonresident defendants to a fair and impartial trial in the state in which they are an unfortunate participant in an automobile accident. Removable proceedings should be made available to these defendants without the risk of such severe penalties.

Respectfully submitted,

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August 29, 1963

APPENDIX A

Present: All the Justices

Record No. 5553

ARTHUR LEVINE

v.

EMILY KATHRYN LACY

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN
Richmond Virginia, April 22, 1963

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY
Rayner V. Snead, Judge

The question for decision on this appeal is whether the trial court erred in entering a judgment by default in favor of the plaintiff below against the defendant below, pursuant to Rule 3:19 of Rules of Court.

On February 10, 1961, the plaintiff, Emily Kathryn Lacy, a resident of Loudoun county, Virginia, filed in the Circuit Court of that county a motion for judgment against the defendant, Arthur Levine, of Rockville, Maryland. She alleged that the defendant so negligently drove his automobile that he collided with the automobile being driven by her while stopped in her lane of travel preparatory to making a left turn, and that she thereby received injuries for which she was entitled to recover from the defendant damages in the sum of $25,000.

On February 13, 1961, notice of the motion for judgment with a copy of the motion was duly served on the Commissioner of Motor Vehicles, the statutory agent of the defendant, and duly forwarded by the Commissioner to the defendant by registered mail, all as prescribed by §§ 8-67.1 and 8-67.2 of the Code of Virginia. The defendant says he received the notice and copy of the motion for judgment within a day or two after February 13, 1961.

The defendant filed no pleading in response to the notice for judgment within twenty-one days after service thereof on him as required by Rule 3:5 of Rules of Court.

On March 9, 1961, defendant filed in the United States District Court for the Eastern District of Virginia, a petition and bond for the removal of the case to that court on the ground of diversity of citizenship. Notice of the filing of the petition and bond was mailed to plaintiff's counsel on March 9, 1961, and a copy of the petition was filed in the clerk's office of the Circuit Court of Loudoun county on March 13, 1961, pursuant to Title 28, § 1446(e), United States Code Annotated.

Also on March 9, 1961, defendant filed in the United States District Court a document titled "Defendant's Answer and Counterclaim," a copy of which was mailed to plaintiff's counsel and a copy was filed in the clerk's offices of the Circuit Court of Loudoun county on March 13, 1961.

By an order entered by the United States District Court on September 26, 1961, the case was remanded to the Circuit Court of Loudoun county. A copy of the order was received and recorded in the clerk's office of the latter court on October 4, 1961.

On October 9, 1961, the Circuit Court of Loudoun county, on motion of the plaintiff, entered its order finding that more than twenty-one days had elapsed after service of process on the defendant without an answer being filed, awarding to plaintiff a judgment by default, and appointing October 25, 1961, for hearing evidence and fixing the amount of damages. However, on October 18, 1961, being the date on which defendant filed a motion to set aside the default judgment, the court heard plaintiff's evidence and granted judgment to the plaintiff in the sum of $9,000. The finality of this order was vacated and execution on the judgment stayed by subsequent orders until February 26, 1962, when defendant's motion of October 18, 1961, and his

amended motion filed October 27, 1961, to set aside the default judgment, were denied and the judgment made final by order of that date, from which the defendant now appeals.

In his assignments of error the defendant says that the court erred (1) in entering a judgment by default and in hearing evidence as to damages without notice to the defendant; and (2) in denying defendant's motion to set aside the default judgment and permit a trial on the merits.

Rule 3:5 of Rules of Court provides that a defendant may within twenty-one days after service on him of the notice of motion for judgment file in the clerk's office his pleadings in response, and if he fails to file a pleading he is in default.

Rule 3:19 of the Rules of Court is as follows:

"A defendant who fails to plead to a notice of motion for judgment within the required time is in default. He is not entitled to notice, including notice to take depositions, of any further proceedings in the case. He waives trial by jury and all objections to the admissibility of evidence. The court shall, on motion of plaintiff, enter judgment for the amount appearing to the court to be due. If the relief demanded is unliquidated damages the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages."

The defendant would escape the consequences of his failure to comply with Rule 3:5, of which he was specifically notified, as required by Rule 3:3, when served with process, on the ground that "an examination of the file revealed the defendant's Answer and Counterclaim". This referred to the answer and counterclaim filed in the Federal court, a copy of which was received and marked filed by the clerk of the State court on March 13, 1961. Even if this document should be considered as a responsive pleading to the

motion for judgment in the State court, it was not filed in that court within twenty-one days after service of the notice of motion for judgment as required by Rule 3:5. As stated, service was made on February 13 and the document was not filed in the State court until March 13. The twenty-one days had in fact elapsed before it was filed in the Federal court on March 9.

Title 28, § 1446(e), U.S.C.A., *supra*, provides that after the removal is effected "the State court shall proceed no further unless and until the case is remanded". After compliance with the removal statute the jurisdiction of the State court is suspended until there has been a remand, *Lowe v. Jacobs*, 5 Cir., 243 F. 2d 432, and cases there cited; and in the interim pleadings cannot be effectively filed in the State court; *Hopson v. North American Ins. Co.*, 71 Idaho 461, 233 P. 2d 799, 25 A.L.R. 2d 1040, and Anno. 1045; *Beleos v. Life & Casualty Ins. Co.*, (DC S.C.), 161 F. Supp. 627.

In addition to the copy of the answer and counterclaim, says the defendant, "there was on file the plaintiff's Answer to the defendant's Counterclaim". There is in the court file what purports to be a copy of the plaintiff's reply to the defendant's counterclaim as filed in the Federal court. It appears to have been mailed to the clerk of the Federal court on March 23, 1961, by counsel other than the counsel who represented the plaintiff in the motion for judgment. It was not filed in the State court at any time, so far as appears from this record, and was of no effect with respect to the State court proceeding. There is also in the record an order entered by the Circuit Court on November 16, 1961, dismissing with prejudice the counterclaim of the defendant against the plaintiff, the order reciting that the matters at issue in the counterclaim had been compromised and settled. This order was not endorsed as required by Rule 3:16 by counsel who represented the plaintiff in this motion for judgment and it is not indicated

that plaintiff or her counsel had any knowledge of it. It could have no effect on the default judgment previously entered for the plaintiff on October 18, 1961.

Clearly the defendant was in default when the case was remanded on September 26, 1961. Under the specific terms of Rule 3:19, *supra*, he was not entitled to notice of any further proceedings in the case, including the time of hearing evidence as to damages, and the fixing of the amount thereof by the court. Nothing that appears in the record affords any basis for the contention of the defendant that the plaintiff waived her right to the default judgment under Rule 3:19. *Cf. The Covington Virginian* v. *Woods*, 182 Va. 538, 547 *ff*., 29 S.E. 2d 406, 410-11; 92 C.J.S. Waiver, pp. 1041 *ff*.

On his second assignment the defendant contends that the court should have extended the time for his filing of responsive pleadings as permitted by Rule 3:13, which provides that the time allowed for filing pleadings may be extended by the court in its discretion, even though the time fixed has already expired. However, as pointed out by plaintiff in her brief, no motion was ever made for such an extension nor any reason given for exercising such discretion. Defendant's argument is that our Rules should be construed so as to do substantial justice, and that the trial court under the circumstances should have set aside the default judgment and permitted "a trial of the issues".

Rules 3:5 and 3:19 are plain and need no construing. The defendant must file his responsive pleading within the twenty-one days prescribed by Rule 3:5 or suffer the consequences prescribed by Rule 3:19 unless the filing time is extended by the court at its discretion. As stated, the court was not requested to exercise that discretion. Defendant's motion and amended motion requested the court to set aside the default judgment primarily because of the proceedings in the Federal court. During that period all proceedings in the State court were suspended and defend-

ant's motions offered no excuse for failing to file responsive pleadings in the State court in the time required, and presented no reason, in fact no request, for extending that time. Defendant's effort to remove the case to the Federal court cannot restore to him a right already lost to file pleadings in the State court.

In *Cooper* v. *Davis*, 199 Va. 472, 100 S.E. 2d 691, the trial court rejected defendant's grounds of defense and affidavit filed some months after the entry of a default judgment because they did not present a reasonable excuse for the defendant's failure to act within the time required by Rule 3:5, and defendant was not allowed to defend on the merits in a subsequent jury trial to assess damages. We affirmed the judgment and said:

"The trouble with the defendant's contention is that his diligent pursuit for judicial relief was begun too late. Rule 3:5 'contemplates and requires that a defendant file his responsive pleadings "within twenty-one (21) days after service on him of the notice of motion for judgment." ' (*Herndon* v. *Wickham*, 198 Va. 824, 826, 97 S.E. 2d 5, 7.) The notice of motion for judgment served on the defendant, prepared in accordance with Rule 3:3, so told him in plain language. Yet the defendant made no attempt to file the required pleadings for more than four months after the service of the notice on him." 199 Va. at 476, 100 S.E. 2d at 694.

In *McCanna* v. *Mutual Investment & Agency Co.*, 37 N.M. 597, 26 P. 2d 231, a case brought in the State court was removed to a Federal court and was afterwards remanded to the State court where a default judgment was entered against defendants. Defendants later filed a motion to vacate the judgment, alleging that they had a meritorious defense and that the default judgment was rendered on the day the case was remanded. Their motion was overruled and defendants appealed, contending that in justice

to their cause they should be allowed to defend on the merits. In affirming the trial court's decision the Supreme Court said:

"• • • To do justice to both litigants herein we must apply the principles of law and adhere to the established rules of practice and procedure which are known and established in this jurisdiction, for, otherwise, what seems justice to one would appear as injustice to another. Justice within the law is justice to all. • • •." 37 N.M. at 598, 26 P. 2d at 231-2.

Rules 3:5 and 3:19 were adopted in the interest of expediting the maturing and hearing of cases. A defendant is warned when he is served with process as to the time within which he must make his response. He may have an extension of that time if he makes proper application and shows reasonable cause therefor. Otherwise the Rules are to be applied according to their terms.

We find no error in the action of the trial court and the judgment appealed from is accordingly

Affirmed.

APPENDIX B

28 U.S.C.A. 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

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No. 435

IN THE

Supreme Court Of the United States

OCTOBER TERM, 1963

ARTHUR LEVINE, *Petitioner*

v.

EMILY KATHRYN LACY, *Respondent*

PETITION IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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PETITION IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTION

The Respondent invites the Courts attention to the record which discloses that the Federal claim now made in the petition filed herein was first presented in the Supreme Court of Virginia in the form of Petition for Re-

hearing filed by the Petitioner subsequent to the decision of the Supreme Court of Appeals of Virginia rendered April 22, 1963, which Petition for Rehearing was denied without opinion. The Petitioner did not raise the question in the Trial Court.

The facts are analogous to those decided by this Court, *American Surety Co.* v. *Baldwin* (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98) wherein Mr. Justice Brandeis delivered the opinion of the Court dismissing a writ of *certiorari* stated,

> . . . The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The Federal claim there made cannot serve as the basis for review by this Court. The contention that a Federal right had been violated rests on the action of the Trial Court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but, solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment . . .

QUESTIONS PRESENTED

1. Did the Court err by entering a default judgment in favor of the Respondent?

2. Did the Court err in refusing to set aside the Petitioner's judgment by default?

Assignments of Error by the Petitioner in the State Court were as follows:

1. The Court erred in entering a judgment by default in favor of the plaintiff and in permitting *ex parte* proof of the plaintiff, without notice to the defendant herein.

2. The Court erred in denying the defendants motion to set aside the plaintiff's judgment by default and permit the cause herein to be tried upon its merits.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The United States Constitution, Amendment 14, Section 1, Rule 81 (c)., Federal Rules of Procedure or Title 8, Section 67.3 Virginia Code, 1950 amended, as will appear from the record were never raised by the Petitioner in the Trial Court as will appear from the record.

STATEMENT OF CASE

Petitioner in his Statement of the Case concedes that on February 9th, 1961, the Respondent filed a Motion for Judgment against the Petitioner, seeking damages in the sum of Twenty-Five Thousand Dollars ($25,000.00) for injuries alleged to have been received as a result of a collision due to the negligent operation of an automobile by the Petitioner on August 21st, 1960. Service was made on the Commissioner of the Division of Motor Vehicles, on February 13th, 1961, who forthwith sent by Registered Mail to the Petitioner in Rockville, Maryland, notice of the service and a copy of the process. It is conceded that the notice and process were received by the Petitioner a day or two after February 13th, 1961.

Twenty-four (24) days after Petitioner admittedly received a copy of the notice and process he filed on March 9th, 1961 in the District Court for the Eastern District of Virginia a Petition for Removal (R., 2). At the same time

the Petitioner filed an answer and counter-claim. A copy of each of said pleadings was mailed to the Clerk of the Circuit Court of Loudoun County and filed by him on March 13, 1961 (R., 2). Respondent filed a motion for remand, which was sustained by the District Court and the case remanded to the Circuit Court of Loudoun County on October 4th, 1961.

On the succeeding term day of the Circuit Court of Loudoun County, Respondent moved for a default judgment, which motion was granted and the case set for hearing on the question of damages before the Court on October 25th, 1961 (R., 5), at which time a judgment was rendered in favor of the Respondent for the sum of Nine Thousand Dollars ($9,000.00). On the same day Petitioner, who admittedly had notice of the hearing, moved to set aside the Orders of October 9th, 1961 (Default Judgment) and October 18th, 1961 (Award and Judgment) (R., 5).

On October 27th, 1961 Petitioner filed an amended motion to set aside the Default Judgment or that the awards of same be set aside and the case docketed for trial upon the merits. (R., 7)

On November 6th, 1961 an Order was entered extending the finality of the Order entered October 18th, 1961 (Award and Judgment) for thirty (30) days, which was subsequently extended by Orders entered on December 11th, 1961 and January 5th, 1962 through February 6th, 1962.

On November 16th, 1961 the Circuit Court of Loudoun County entered, as agreed, an Order dismissing the counter-claim which has previously been filed in the Federal Court and a copy filed in the Circuit Court of Loudoun County (R., 9).

On February 26th, 1962 a final Order was entered overruling Petitioner's Motion and Amended Motion, to which Order the Petitioner duly objected and excepted (R., 10).

ARGUMENT I

The Court correctly entered a default judgment in favor of the Respondent.

Petitioner contends that the lower Court erred in entering a default judgment on October 9, 1961, since the file disclosed an answer and counter-claim were copies of the answer and counter-claim filed in the Federal Court.

Under Title 28, Section 1446, U.S.C.A., once the Petitioner's Petition for removal, accompanied by bond, was filed in the Federal District Court for the district in which the action was pending, and notice thereof was given to adverse parties and a copy of the Petition was filed with the Clerk of the Circuit Court of Loudoun County as required by 28 U.S.C.A. Section 1446 (e), all of which Petitioner admittedly accomplished by March 13, 1961, the removal was effected.

The State court was thereby deprived of jurisdiction to proceed further with any phase of litigation, unless and until the case would be remanded by the United States Court. This is true irrespective of whether the action was in fact removable, which is a question for the Federal Court. *Lowe* v. *Jacobs*, 243 F.2d 432 (5th Cir. 1957).

The filing of pleadings in the State Court which would otherwise be valid if the Federal Court found the cause non-removable are barred upon the filing of the Removal Petition. *Beleos* v. *Life & Casualty Ins. Co.* (DC SC) 161 F.Supp. 627.

When the action is removed to the Federal Court, the jurisdiction of the State Court is suspended until the case is remanded by the Federal Court, at which time the State Court resumes jurisdiction, and the case stands as it did at the time of removal. *Dauenhauer* v. *Superior Court*, 149 Cal. App.2d 22, 307 P.2d 724; *Allen* v. *Hatchett*, 91 Ga. App. 571, 86 S.E.2d 662.

No valid proceedings can be taken in the State Court after removal and any action so taken prior to remand to the State Court is of no force or effect. State ex rel. *Gremillion* v. *National Asso. for Advancement of Colored People* (La. App.) 90 So.2d 884.

Copies of the answer and counter-claim filed in the Federal Court and mailed to the Clerk of the lower court along with a copy of the Petition for Removal did not constitute an answer and counter-claim in the suit pending in the lower court for three reasons: (1) the defensive pleadings filed were copies of pleadings filed in the Federal Court and so styled including the designation "answer" rather than grounds of defense, (2) jurisdiction of the lower court having been suspended defensive pleadings could not be filed and (3) Under Rules 3:5 and 3:8 the defendant was in default and since the time for filing pleadings had not been extended by the lower court pursuant to Rule 3:13, no pleadings could be filed without a court order. It is noteworthy that at no time did the Petitioner ask leave to file defensive pleadings.

Petitioner claims that the filing of defensive pleadings in the lower court to a copy of the counter-claim filed in the Federal Court at a time when the lower court was divested of jurisdiction constituted a waiver of the Petitioner's failure to file defensive pleadings to the motion for judgment. It might be well to note that Petitioner admits that the defensive pleadings filed to the counter-claim were

filed by counsel other than counsel representing the Respondent in the motion for judgment. Furthermore it was done at a time when the lower court was divested of jurisdiction to wit: March 23, 1961. The filing of such pleadings are barred. *Beleos* v. *Life & Casualty Ins. Co.*, supra; State ex rel. *Gremillion* v. *National Asso. for Advancement of Colored People*, supra

In *Kingsbury* v. *Brown*, —Idaho—, 92 P2d 1053, 124 A.L.R. 149, Appellant instituted an action against Appellee and others seeking the recovery of damages. Appellee petitioned for removal to the District Court of the United States. Subsequently the District Court remanded, and Appellant moved for a default judgment, the time for the filing of defensive pleadings having expired. On the same day Appellee moved for an order vacating the default judgment, and subsequently the Trial Judge entered an order vacating the default judgment, and allowing the filing of an answer and counter-claim. Appellant appealed on the ground that the lower court erred in entering the order vacating the default judgment and allowing the filing of the Appellee's answer and counter-claim.

In reversing the court stated:

> Upon the filing of the default and default judgment, May 24, 1938 respondent was out of court, and the filing of his answer, June 2, 1938, was unauthorized and void, adding nothing to his legal rights. Jones v. Moers, supra; and the cases therein cited. Appellant's motion to strike the unauthorized and void answer did not affect the conclusiveness of the default or the judgment.
>
> It appears unquestioned that this court has heretofore determined that a litigent attempts to remove and removes a cause from the state to the federal court at his peril and if he makes no appearance in the state court prior to the time of such removal and his default

is entered he cannot thereafter have such default vacated and the judgment set aside on the ground of mistake, inadvertence and excusable neglect.

In *McCanna* v. *Mutual Investment & Agency Co.*, et al. 26 P.(2d) 231, 37 N. M. 537, the appellee filed her complaint on July 2, 1930. On August 23, 1930 appellants filed notice, petition and bond for removal to the Federal Court. No other pleadings were filed. On January 12, 1932 the case was remanded to the State Court and appellee took a default judgment on the same day.

Appellants filed a motion to vacate the judgment on March 10, 1932 alleging a good defense which motion was overruled by the trial court and the appellants appealed. In affirming the Supreme Court of New Mexico said:

(1) That appellants had a good defense to the complaint is not alone sufficient to justify this court in holding the trial court abused its discretion in refusing to vacate a default judgment.

This case comes clearly within the rule laid down and established in this jurisdiction in the case of *Citizens' Light, Power & Telephone Company* v. *Usnik*, 26 N. M. 494, 194 P. 862.

(2-3) We have held adversely to appellants on every question here presented in the Usnik case, and we cannot distinguish this case from the Usnik case. The distinction sought to be made by eminent counsel for appellants that in the Usnik case the appellee waited thirteen days, whereas in this case the appellee took judgment immediately, does not move us. The right to default is as complete and attaches as fully the very moment the state court resumes jurisdiction after remand as at any time subsequent thereto. Appellee had a legal right to his default judgment at the very moment it was entered.

(4-6) Appellants contend that in the justice to their cause, in order to enable them to defend the case on its merits, the order of the trial court be reversed, the judgment vacated and they be permitted to answer. To do justice to both litigants herein we must apply the principles of law and adhere to the established rules of practice and procedure which are known and established in this jurisdiction, for, otherwise what seems justice to one would appear as injustice to another. Justice within the law is justice to all. To achieve this end, we must apply the known and established rules of practice and procedure, and not be tempted to deviate from the established course in a particular case. Appellants and appellee both are charged with knowledge of the procedure in a case of this kind. We laid down the rule in 1921, in the Usnik case, that the party who removes a case to the Federal Court does so at his peril, and it is incumbent upon him to see his rights are protected in the State Court in the event that the Order of Removal is determined by the Federal Court to have been improper and the case remanded. Unquestionable counsel for appellants were familiar with the law, and in their motion to vacate give no valid excuse for failing to demure or answer at the time of filing their Petition for Removal, which procedure is clearly pointed out in the Usnik case. We see no abuse of discretion in the entry of the order of the District Court of Bernalillo County denying appellant's motion to vacate the judgment for appellee. The cause will be remanded for appropriate action.

It would be an anomaly indeed, if a defaulting defendant by making a belated plea for removal to a Federal Court, could thereby secure rights not otherwise available.

The authorities cited by Petitioner under the first Assignment of Error are distinguishable from the case at bar and do not support the allegation that the Trial Court erred in permitting a Default Judgment to be entered in favor of Respondent. In *Salzar, et al.* v. *Schwartz*, 107 S.E. 298, the West Virginia Court held that a Defendant who timely

appeared, pleaded the general issue, filed notice of recoupment and arranged for a continuance, had not waived his right to trial by jury by his failure to appear in the court room when the case was called for trial three years later. In *Covington Virginian* v. *Woods*, 182 Va. 538, the Defendant posted a defective bond in appealing from the adverse judgment of the trial justice, and the Court held that Plaintiff had not waived his right to move for dismissal in the Circuit Court on that ground, merely because he undertook to get a date set for a hearing. The case of *Heath* v. *Valentine*, 177 Va. 731, is not in point, as it concerns the doctrine of equitable estoppel as affecting title to real estate.

> It is sometimes said that waiver is based, or . . . rests, and depends, solely on the intention of the party against whom the waiver is asserted, and is essentially a matter or question of intent, and therefore a waiver must be intentional; an intentional act with knowledge; and it is the intentional relinquishment of a right that lies at the foundation of the doctrine of waiver . . .. The most rudimentary essential of a waiver is that the waiving party shall in some manner publish his intention to relinquish his rights, either by words or conduct; and the intention which is essential to the establishment of a waiver is not the secret intention of the party, rather, it is the intention which is manifested by conduct or words in relation to the matter involved . . . (S)ilence, to constitute a waiver, must be deceptive silence, and it must be accompanied by an intention to defraud which amounts to a positive beguilement. Mere silence is never a waiver where there is no duty or occasion to speak; and where such silence is unaccompanied by any act calculated to mislead, and in the absence of conduct amount to an estoppel, there is no waiver. 92 C.J.S. Waiver, pp. 1057-1065.

In the case at bar, Respondent never intended to relinquish her right to a default judgment. Her conduct or

words in responding to the counter-claim asserted against her in the Federal Court did not maifest an intent to waive her rights under Rules 3:5 and 3:19 concerning her claim in the State Court. Her silence as to her right to Default Judgment came at a time when the State Court was temporarily divested of jurisdiction to entertain a motion to that effect, and therefore came at a time when Respondent had no ruty or occasion to speak. Promptly upon remand, Respondent took such steps as were necsssary to secure her right to default judgment. At no time was Respondent's silence in any way deceptive, nor was it accompanied by an intention to defraud.

ARGUMENT II

The Court correctly refused to set aside Petitioner's judgment by default.

Petitioner contends that he filed an answer in the lower court, however, the record disclosed on such filing. True, a copy of the answer filed in the Federal Court was mailed to the Clerk of the lower court and also to counsel for the Petitioner, but these were pleadings to be met in the Federal Court not the lower court. The appending of a certificate under Rule 3:15 would confer no additional dignity nor would the filing by the lower court Clerk of such pleadings remove their void status.

Petitioner claims that the filing of a copy of the Petition for Removal in the lower court constituted a general appearance. A general appearance is submission to the jurisdiction of the Court (Black's Law Dictionary) which is the antithesis of removal. In 3 AM. JUR., *Appearance*, Section 29, the author states:

> It is now well settled, both in the Federal Courts and in most of the state courts which have considered the point, that an appearance in a state court merely for the purpose of presenting an application for removal to a Federal Court does not constitute a general appearance.

Petitioner says that Rule 3:5 should be read together with Rule 3:13 which permits the Court in its discretion to extend the time for filing of pleadings. Suffice it to say that no motion was ever made for such an extention nor cause shown why an extension should be granted. At no time has the Petitioner as much as alleged he had a valid defense to the Respondent's claim.

In *Cooper* v. *Davis, an infant, et.*, 199 Va. 472, 100 S.E.2d 691, on December 7, 1955, Plaintiff filed a motion for judgment against the Defendant for damages sustained as a result of injuries received while on the Defendant's premises. No defensive pleadings were filed, and a default judgment was entered on April 10, 1956. On the same day the default judgment was entered, the Defendant appeared by counsel and denied knowledge of the action and claimed to have a valid defense. Whereupon the default judgment was vacated.

Subsequently Defendant filed a motion to quash the Service of Process which was overruled by the Court at a later hearing. On November 7, 1956, Defendant by other counsel filed a new motion to be relieved of default, and there was tendered and asked leave to file his grounds of defense and an affidavit denying ownership or control of the premises. Plaintiff objected to the filing of the grounds of defense and the affidavit, and the lower court sustained the objection. Defendant appealed assigning as error that the lower court erred in not permitting the Defendant to file his grounds of defense to the case on its merits.

In affirming this Court stated at Page 476:

> The trouble with the defendant's contention is that his diligent pursuit for judicial relief was begun too late. Rule 3:5 'contemplates and requires that a defendant file his responsive pleadings "within twenty-one (21) days after service on him of the notice of motion for judgment."' (Herndon v. Wickham, 198 Va. 824, 826, 97 S.E.2d 5, 7.) The notice of motion for judgment served on the defendant, prepared in accordance with Rule 3:3, so told him in plain language. Yet the defendant made no attempt to file the required pleadings for more than four months after the service of the notice on him...
>
> But if such statements in the defendant's testimony and affidavit are taken at their face value they merely amount to a showing of gross neglect and carelessness on his part, and do not constitute a reasonable or legal excuse for his failure to comply with the rule. It is a plain case where the lower court, in the exercise of the discretion lodged in it by Rule 3:13, was fully justified in refusing to allow the defendant to file his grounds of defense after having been so long in default.

Petitioner states that the judgment should have been set aside since there is no showing that the Respondent's rights would be jeopardized, or that she would have been taken by surprise by extending the time to answer. The record certainly does not disclose this and there is no statement of fact that would justify such a conclusion. Clearly there would be an abuse of discretion to allow the filing of a late grounds of defense without just case shown. *Turner v. Buick Corporation*, 201 Va. 693, 695; 112 S.E.2d 911. Without such a showing an extension of time under Rule of Court 3:13 would be arbitrary rather than discretionary.

Inasmuch as Petitioner admits receipt of process not later than February 15, 1961, there is little merit to the contentions that his non-residency should afford him additional considerations. Where the Court has extended the time for filing grounds of defense it has been on a showing of cause. See *Insurance Company v. Bresterman*, 201 Va. 822, 823, 113 S.E.2d 862, re: late answers in chancery cause under Rule 2:23, which corresponds to Rule 3:13 in actions at law, *Turner* v. *Buick Corporation*, 201 Va. 693, 695, 112 S.E.2d 911.

Authorities cited by Petitioner in regard to the second Assignment of Error do not support the contention that the lower court erred in refusing to set aside the default judgment. In *Herndon* v. *Wickham*, 198 Va. 824, the action of the trial court in permitting Defendant to amend grounds of defense which had been timely filed was held to be a proper exercise of discretion under Rule 3:13. In the case at bar, however, no responsive pleadings were filed within twenty-one (21) days. It is to be noted that this Court, at page 826, stated that Rule 3:5

> . . . contemplates and requires that a defendant file his responsive pleadings within twenty-one (21) days after service on him of the motion for judgment.

In *Williams* v. *Service Corp.*, 199 Va. 326, although no responsive pleadings had been filed by Defendant within twenty-one (21) days, the trial court gave Defendant an extension of time within which to file grounds of defense. No such action was taken by the trial court, nor requested by Defendant, in the case at bar. In *Jacobson* v. *Southern Biscuit Co.*, 198 Va. 813, the Supreme Court of Appeals merely sustained the action of the trial court in permitting Plaintiff to amend his motion for judgment to change the name of Defendant, where the right Defendant was before

the Court under the wrong name. In *Turner* v. *Burford Buick Corp.*, 201 Va. 693, the trial court allowed Defendant to file grounds of defense after twenty-one (21) days "for good cause shown," and the Supreme Court of Appeals sustained this action. In the case at bar, no effort was ever made by Petitioner to show good cause for not having filed responsive pleadings on time.

Petitioner contends he was denied due process of law, certainly he had an opportunity to defend and for reasons known only to the Petitioner he failed to file responsive pleadings, and presumably rested on his rights to appeal the remand ordered by the Federal Court, the case presents a situation similar in *American Surety Co.* v. *Baldwin* (287 U. S. 77 L. Ed. 231, 53 S. Ct. 98) wherein this court stated . . .

> . . . The fact that its opportunity for a hearing was lost because misapprehesion as to the appropriate remedy was not removed by judicial decision until it was to late to rectify the error does not furnish the basis for a claim that due process of law has been denied. Compare O'Neil v. Northern Colorado Irrig. Co. 242 U. S. 20, 26, 61 L. Ed. 123, 128, 37 S. Ct. 7. Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the Federal Court. Federal claims are not to be prosecuted piecemeal in state and Federal courts, whether the attempt to do springs from a failure seasonable to adduce relevant facts, as in Grubb v. Public Utilities Commission, 281 U. S. 470, 479, 74 L. Ed. 972, 979, 50 S. Ct. 374, or from a failure seasonable to pursue the appropriate state remedy.

CONCLUSION

1. Petitioner had ample time within which to file defensive pleadings in the Circuit Court. No excuse is given

for such failure, nor was just cause shown for an extension of the time for filing late pleadings.

2. With knowledge of the default judgment and of the hearing on the question of damages Petitioner failed to show any facts that would justify the Court in setting aside its judgment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 435

ARTHUR LEVINE, *Petitioner*

v.

EMILY KATHRYN LACY, *Respondent*

PETITION FOR REHEARING FROM THE DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 435

ARTHUR LEVINE, *Petitioner*

v.

EMILY KATHRYN LACY, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia

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PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of this Court's order dated December 2, 1963, denying the petition for a writ of certiorari to the Supreme Court of Appeals of Virginia, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Where the District Court clearly had jurisdiction of a case removed from the State Court, and the order of remand was based upon a procedural defect, the Federal Removal Statute would require the State Court to give sufficient effect to petitioner's answer, counterclaim and reply thereto, filed in the District Court, to avoid the entry of a default against the petitioner, without notice, upon remand to the State Court.

Upon petitioner's filing of his petition for removal, on March 9, 1961, the District Court undoubtedly assumed jurisdiction of this case. The test of the jurisdiction of the District Court, upon removal, is the same as the standard of its original jurisdiction. Here there is no dispute that diversity of citizenship and the required amount in controversy existed. 28 U.S.C.A. 1441.

The order of remand from the District Court to the State Court on September 26, 1961, was based upon petitioner's failure to file his petition for removal within 20 days after service upon the Virginia Commissioner of Motor Vehicles. The requirement that the petition for removal be filed within 20 days after petitioner's receipt of the suit papers, by service or otherwise, is a statutory *procedural* requirement and does not affect the jurisdiction of the District Court. 28 U.S.C.A. 1446 (b) *Parks* v. *New York Times Co.*, D.C. Ala. 1961, 195 F. Supp. 919; *Seigler* v. *American Surety Co. of N. Y.*, D.C. Calif. 1956, 151 F. Supp. 556; *Fisher* v. *Exico Co.*, D.C. N.Y. 1952, 13 F.R.D. 195; *Green* v. *Zuck*, D.C. N.Y. 1955, 133 F. Supp. 436.

In this case the District Court had active jurisdiction for a period in excess of six months. During that time petitioner filed a timely answer and counterclaim and the respondent filed a reply thereto in the District

Court. Whether the State Court continued to have concurrent dormant jurisdiction in the case during this period is questionable. However, the Federal Removal Statute does direct that upon removal the State Court shall proceed no further unless and until the case is remanded. 28 U.S.C.A. 1446 (e). In the event of a remand, the State Court then may proceed with the case. 28 U.S.C.A. 1447 (c).

When the District Court assumes jurisdiction of a removed cause, it takes the case in the posture that it existed in the State Court at the time of the filing of the petition for removal. *Ultronic Systems Corp. v. Ultronix Inc.*, D.C. Del. 1963, 217 F. Supp. 89. If there are any jurisdictional or procedural defects in the case as it comes from the State Court, the parties may pursue them in the District Court. There is no doubt that respondent could have sought a default judgment against the petitioner for failure to file a timely answer, in the District Court. *Anderson* v. *Penncraft Tool Co.*, D.C. Ill. 1961, 200 F. Supp. 145; *Springs Cotton Mills* v. *Machinecraft, Inc.*, D.C. S.C. 1957, 156 F. Supp. 372; *Abraham Land and Mineral Co.* v. *Marble Savings Bank*, D.C. La. 1940, 35 F. Supp. 500. Instead, respondent filed a reply to petitioner's counterclaim and made no mention of a claim for default, occurring in the State Court prior to removal, until the case was remanded to the State Court.[1] The Federal Removal Statute, although giving uniformly to procedures for the removal of a case from the State to the District Court, offers no guide as to the status of the case upon remand to the State Court. In the

[1] An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. 28 U.S.C.A. 1447 (d).

instant case the State Court rules[2] do not provide a procedure for cases where there has been a substantial time gap in the active jurisdiction of the State Court.

It is respectfully submitted that a reasonable construction and application of the Federal Removal Statute would require the State Court upon remand to give sufficient effect to the pleadings and proceedings in the District Court, the only Court having active jurisdiction over the case at the time of filing of such pleadings and proceedings, to avoid the immediate entry of a default judgment, without notice. To apply the Federal Removal Statute differently would do violence to our constitutional guarantees of due process[3] and result in manifest injustice.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the Supreme Court of Appeals of Virginia.

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[2] Rules of the Supreme Court of Appeals of Virginia, governing actions at law.

[3] See comments of Mr. Justice Black to this Court's order of December 2, 1963, denying the petition for certiorari.

Certificate of Counsel

We, John A. Beck and A. Andrew Giangreco, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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.....